IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-73

THE KANSAS CITY STAR COMPANY, FLAMBEAU PAPER COMPANY DIVISION,
Petitioner,

vs.

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and WILLIAM A. ABEL, et al.,
Respondents.

BRIEF

Of William A. Abel and All Others Similarly Situated In Opposition to Writ of Certiorari

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In the Supreme Court of the United States

October Term, 1974

No. . . . . .

The Kansas City Star Company, Flambeau Paper Company Division,
Petitioner,

vs.

Department of Industry, Labor and Human Relations and William A. Abel, George J. Bablick, Kenneth L. Balczewski, Frank T. Baroka, James A. Baroka, Melvin K. Behreandt, Donald N. Black, Orvil G. Black, Eugene L. Boland, Charles M. Bolz, Callis H. Borne, Earl E. Borowski, Dennis D. Bourgard, Lester R. Bourgard, Robert J. Bradle, Anton D. Braunreiter, Joseph A. Brimstein, Dolores H. Bruns, James E. Burbey, Miles T. Christianson, Gary A. Cooley, Richard C. Cooley, Arthur C. Dane, Walter W. Dillon, Ervin H. Engel, Larry R. Erickson, Darrell G. Falstad, Vernon L. Falstad, James J. Fenzl, Lawrence P. Fenzl, A. H. Fleischfresser, Donald E. Franke, Louis A. Franke, Raymond J. Frankiewicz, William G. Gierman, Edward L. Gruber, Leonard W. Gruber, Charles A. Gustafson, Patricia A. Hammond, Edward R. Hanson, Robert A. Hanson, Robert K. Hein, Tom E. Heisler, Alfred E. Herbst, Arthur J. Herbst, Clarence E. Herbst, Delmar J. Herbst, Donald A. Herbst, James E. Herbst, Robert K. Herbst, Stephen A. Herbst, Bernard J. Hilgart, Edwin S. Hilgart, Elmer C. Hilgart, Michael R. Hilgart, Lawrence J. Hilgart, Patrick J. Hilgart, Richard T. Hilgart, Ronald W. Hilgart, Thomas W. Hilgart, Vernon L. Hilgart, Frank J. Hirtreiter, Frederick Hirtreiter, Carlin

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner petitioned for Writ of Certiorari to review judgment and opinion of the Supreme Court of Wisconsin. The brief herein is filed on behalf of William A. Abel and all parties designated as respondents by petitioner other than the Department of Industry, Labor and Human Relations.

JURISDICTIONAL QUESTION

The petitioner contends that there is jurisdiction in this court pursuant to 28 USC Sections 1257(3) and 2101(c) Respondents contend that there is no federal question under the aforesaid laws.

STATUTE INVOLVED

Wisconsin Unemployment Reserves and Compensation Act, as amended, Chapter 108, Wis. R. Stats. (App. pp. A72-A87) Section 108.04(10) thereof which provides:

> "Labor Dispute. An employee who has left (or partially or totally lost) his employment with the employing unit because of a strike or other bona fide labor dispute shall not be eligible for benefit from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed."

STATEMENT OF THE CASE

Essentially the facts are as stated by the Petitioner. On page 9 of Petitioner's brief, however, there is the statement,

> "As a result union members engaged in a labor dispute over their terms and conditions of employment with Petitioner were paid unemployment compensations."

The findings of the Department of Industry, Labor and Human Relations of Wisconsin and of the Supreme Court of Wisconsin were that there was no bona fide labor dispute and that was dispositive of the question. (App. pp. A11, A63)

ARGUMENTS IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

I. There Is No Federal Question

Petitioner throughout its petition has presented as an unequivocal fact that there was a labor dispute and, therefore, unemployment compensation was allowed to employees who were "temporarily unemployed due to a labor dispute over the terms and conditions of employment". This was, therefore, given as reason to analogize this case with a number of cases cited for the proposition that the United States Supreme Court considers as an open question whether a state by law can permit payment of unemployment compensation or welfare funds to employees involved in a labor dispute. The analogy is inapposite. The cases cited by Petitioner[1] generally involved situations where the State law permitted payments to those unemployed because of a labor dispute thus putting in issue the neutrality of the State in a labor dispute. The Wisconsin State law denied benefits to such individuals, thus insuring the neutrality of the State.

Another case cited as analogous, *Nash v. Florida Industrial Commission*, 389 US 235 (1967) denied an applicant unemployment compensation because he had filed an unfair labor practice charge with the National Labor Relations Board. Obviously on its face there was a clear and unequivocal impingement of a federal right; therefore, there was a federal question involved. In the instant case there is no federal right denied the Petitioner. There is no federal question involved in any way herein. This is plainly a decision on a State question and was decided on independent State grounds, to-wit, was there a labor

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[1] *Super Tire Engineering Co. v. McCorkle*, — US —, 40 L. Ed. 2d 1, 94 S. Ct. — (1974) and others in Petition for Writ, footnote, page 10.

dispute within the meaning of the State statute. Therefore, the U.S. Supreme Court will not take jurisdiction. *Dickson v. Duffy*, 342 US 33 (1951).

Involved herein was a pure question of fact-finding by the adjudicating body of first resort, the Department of Industry, Labor & Human Relations of Wisconsin. Examination of the statute shows that it sets forth certain factual elements that must be found before an unemployed person can be denied unemployment compensation, one of those being that there is a bona fide labor dispute. The existence of that fact must be determined in some way by a responsible fact finder. In effect, Petitioner would tie the hands of the Department, at least in the present case, to the proposition that it is bound by the unilateral declaration by the employer-petitioner that said employer considers that there was a bona fide labor dispute present. It is obvious that the practical effect of such an interpretation of law would deprive the Department of any power in any case to make this very necessary finding and in effect nullify it as the administrator of the law in at least that case where an employer wished to rely upon the issue of the labor dispute to deny benefits. In no instance then could any employee have this very vital issue of fact decided. This then is an issue of fact under State statute and judgment was based upon adequate independent State grounds. *Murdock v. Mayor of Memphis*, 87 US 429 (1874); *Waters-Pierce Oil Co. v. Texas*, 212 US 86 (1909).

II. The United States Supreme Court Will Not Substitute Its Findings of Fact for That of the State Court.

> "The Supreme Court does no ordinarily sit to decide questions of fact." *Handbook of the Law of Federal Courts*, Charles Alen Wright, p. 431 (1963).

Petitioner would call upon the Court to substitute its fact-finding for that of the State Court.

It is the long established principle that the Supreme Court in an action at law at least will not assert jurisdiction to review the decision of the highest court of the State, upon a mere question of fact, although a federal question would or would not be presented, according to the way in which a question of fact was decided. *Waters-Pierce Oil Co. v. Texas*, 212 US 86 (1909); *King v. West Virginia*, 216 US 92 (1910). As stated in *Wolfe v. North Carolina*, 364 US 177, 195 (1960), where appeal of a criminal conviction in a State court was denied:

> "[W]hen as here there can be no pretense that the (state) Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." (Citing *Nickel v. Cole*, 256 US 222, 225, 65 L. Ed. 900, 905, 41 S. Ct. 467).
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> * * *
>
> "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." (citing *Watts v. Indiana*, 338 US 49, 50, 93 L. Ed. 1801, 1804, 69 S. Ct. 1347, 1357).

No more here than in *Wolfe* can one find any intent to evade a constitutional right of the Petitioner.

III. The Controversy Is Moot.

Petitioner gives recognition to the question of mootness as grounds for this Court refusing certiorari (Brief, p. 11). Judicial notice was taken of the fact in both the lower court decision and the Wisconsin Supreme Court decision that the Employer and Unions agreed on the terms of the new agreement on December 11, 1971 while the issue of the payment of un-

employment compensation benefits was still before the Department of Industry, Labor & Human Relations of the State of Wisconsin. (App. pp. A32, A53) Petitioner cites *Super Tire Engineering Co. v. McCorkle*, — US —, 40 L. Ed. 2d 1, 94 S. Ct. — (1974) as a case in which this Court recognized a federal question might be involved because of state economic support to strikers through payments of benefits through either welfare or unemployment compensation. The Court therein recognized that the issue may or may not be moot depending upon the potential for repetition of the State action. The Court stated at 40 L. Ed. 2d 8:

> ". . . we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here 'capable of repetition, yet evading review', so that petitioners are adversely affected by government 'without a chance of redress'."

The Court then considered *Oil Workers Unions v. Missouri*, 361 US 363 (1960) and *Harris v. Battle*, 348 US 803 (1950). The distinction drawn for those two cases in finding mootness is appropriate for the instant case. In the instant case there is not the element of automatic utilization of unemployment compensation by the employees in every instance involving a possible labor dispute by provision of State law. The Wisconsin State law declares that any bona fide labor dispute disqualifies employees from unemployment compensation. The fact of whether there would be unemployment compensation paid would depend upon the varying decision of the determinative agency as to the presence of a labor dispute. In those cases where there was found to be a labor dispute, payment of unemployment compensation benefits would be barred. The decision in the instant case, whether right or wrong. is unique to this case and its facts and does not set any precedent for any future bona fide labor disputes involving this employer or any other employer. *Super Tire Engineering Co.*, 40 L. Ed. 2d 9 states the test for mootness as follows:

> "As in *Harris and Oil Workers*, the strike here was settled before the litigation reached this Court. But, unlike those cases the challenged governmental action has not ceased. The New Jersey governmental action rests not on the distant contingencies of another strike and the discretionary act of an official. Rather New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent on executive discretion."

That is wholly unlike the situation in the instant case where the policy to pay such benefits is not fixed and definite, but is contingent upon administrative discretion to find the fact whether there is or is not a labor dispute.

CONCLUSION

Because there is no federal question, the Court will not engage in fact-finding where the State Court has already found the facts and the issue is moot, the respondent employees respectfully pray the Court to deny granting the petition for writ of certiorari.

Respectfully submitted

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